I. ATTORNEY GENERAL'S STATEMENT OF LEGAL AUTHORITY FOR MAINE'S NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PROGRAM

1. Authority to Issue Permits.

a. Existing and New Point Sources.

State law provides authority to issue permits for the discharge of pollutants by existing and new point sources, including federal facilities, to waters of the United States to the same extent as required under the permit program administered by the U.S. Environmental Protection Agency ("EPA") pursuant to Section 402 of the Clean Water Act, as amended, 33 U.S.C. § 1251 et seq. (hereinafter "the CWA" or "the Act").

FEDERAL AUTHORITY: CWA §§ 301(a), 402(a)(1), and 402(b)(1)(A); 40 CFR 122.21(a).

STATE STATUTORY AND REGULATORY AUTHORITY: 38 M.R.S.A. §§ 344-A, 361-A (1), 362-A, 413, 414, 414-A and 466; 06-096 CMR Chp. 521, §§ 3 and 4.

REMARKS OF THE ATTORNEY GENERAL:

The State broadly defines "discharge," at 38 MRSA § 361-A (1), as "any spilling, leaking, pumping, pouring, emptying, dumping, disposing or other addition of any pollutant to water of the state." "Direct discharge" is defined, at 38 MRSA § 466, as "any discernible, confined and discrete conveyance, including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation or vessel or other floating craft, from which pollutants are or may be discharged." These definitions, while illustrative, are not intended to be limiting. Accordingly, the definitions of "discharge" and "direct

discharge" under State law are at least as broad as the corresponding federal definitions, found at 40 CFR 122.2.

State law requires a permit for the discharge of pollutants to waters of the State, regardless of any water quality impacts. 38 M.R.S.A. § 413 (1). Any person discharging, or proposing to discharge, pollutants to waters of the State shall make an application to DEP for the appropriate permit. 38 M.R.S.A. § 414; 06-096 CMR Chp. 521.

Following review, the Commissioner of the Maine Department of Environmental Protection ("DEP" or "Department") will issue or deny licenses. Section 341-D of Title 38 provides, however, that in some instances the Maine Board of Environmental Protection ("BEP" or the "Board") shall or may act on a waste discharge application. The BEP is part of the Department and, when acting in its licensing capacity, the BEP is bound by the same statutory and regulatory provisions as apply to the DEP Commissioner. 38 MRSA 341- A (2).

Outside Review of Applications. The Department is authorized to employ "outside reviewers" to aid in review of applications where, among other things, an application cannot be reviewed in a reasonable period of time by existing departmental personnel. 38 M.R.S.A. § 344-A. Notwithstanding such outside review, all processing steps, including public participation, and the ultimate authority and responsibility to approve or deny permit applications remains with the Department. 38 M.R.S.A. § 414-A (1).

Experiments and Scientific Research. The Department is authorized, but not required, to permit experimental discharges. 38 MRSA § 362-A provides:

> Notwithstanding any other law administered or enforced by the department, the board is authorized to permit persons to discharge, emit or place any substances on the land or in the air or waters of

> the State, in limited quantities and under the strict control and supervision of the commissioner or the commissioner's designees exclusively for the purpose of scientific research and experimentation in the field of pollution and pollution control. The research and experimentation conducted under this section is subject to such terms and conditions as the board determines necessary in order to protect the public's health, safety and general welfare, and may be terminated by the board or commissioner at any time upon 24 hours written notice.

In practice, requests for experimental permits are processed in the same manner as license applications. Public notices are made and written permits with conditions paralleling those in licenses are typically issued. The use of this provision is carefully circumscribed and while the State may issue such permits, it is not under any obligation to approve such permits.

Stormwater Program. 40 CFR 122.26 states that the stormwater program is part of the NPDES program. Section 402 (n) (3) of the Clean Water Act provides that a partial state program may be approved only when "such program represents a complete permit program and covers all of the discharges under the jurisdiction of a department or agency of the state." Therefore, delegated states' NPDES programs must include the stormwater program. Maine currently has authority to operate the stormwater program. 38 MRSA §§ 361-A and 413; 06-096 CMR Chp. 521 (9). Section 412-B (3) of Title 38 provides that "purely stormwater systems located in or on or draining from public ways and any alterations in existing facilities" are exempt from submitting, for DEP review, plans and specifications for such drainage systems. Exempting stormwater systems from review or plans, however, does not affect the State's authority and mandate to regulate the pollutants that may be discharged through those systems. Therefore, this

provision does not limit the State's ability to issue stormwater permits or otherwise regulate stormwater in accordance with 40 CFR 122.26.

Snow Dumps. Under 38 M.R.S.A. § 413 (2-B), the department may license snow dumps by rule when the discharge will not have a significant adverse effect on water quality, except there may be no snow dumps directly into fresh surface waters of the State. In addition, the discharge of snow directly into saltwater surface waters (e.g., salt marshes), as well as into fresh surface waters, requires a permit from the U.S. Army Corps or Engineers, under § 404 of the Clean Water Act. State permitting under § 413 (2-B) will not be an alternative to or replacement for the 404 permit.

Pesticide Discharges. 38 MRSA § 414-A (1) (E) provides that a license for a pesticide discharge shall be issued only if the "pesticide discharge is unlikely to exert a significant adverse impact on a nontarget species." This requirement is in addition to, and not an alternative to, the 414-A (1) (A)-(D) that state, among other requirements, that all federal standards must be met.

38 MRSA § 414-A (1-C) establishes certain requirements pursuant to which DEP may issue a license for the discharge of certain algaecides to control algae blooms. These discharges are considered point discharges. See Dubois v. U.S. Dept. of Agriculture, 102 F.3d 1273 (1996). Therefore, the State has the authority to require compliance with water quality and technology-based standards (i.e. dose rate) in connection with these discharges. This subsection simply adds further requirements, but in no way displaces the requirements found at 38 MRSA § 414-A (1).

Log Driving and Storage. 38 MRSA§ 418 (1) provides that no person shall place logs or pulpwood into inland waters of the State, except to transport logs or pulpwood from islands to the mainland. Section 418 (2) provides that the State shall issue permits for log driving and storage in inland surface waters only when it finds that "the proposed use will not lower the existing quality or the classification, whichever is higher, of any waters, nor adversely affect the public rights of fishing and navigation therein, and that inability to conduct that use will impose undue economic hardship on the applicant." While this section does not explicitly state that technology-based standards, as articulated in 40 CFR part 429, subpart I, must be applied, under Maine law compliance with both water quality and technology-based standards must be met before any permit can be issued. 38 M.R.S.A. § 464 (4) (A).

Thermal Discharges and Intake Structures. Section 316 (a) of the CWA requires that the Department have the authority to impose effluent limitations for thermal discharges in order to protect indigenous populations of shellfish, fish, and wildlife. Under 38 M.R.S.A. § 414 and 06-096 CMR Chp. 524(5) the Department is so authorized. Section 316 (b) requires that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available to minimize any adverse environmental impact. The Department has the necessary authority under the State's Natural Resource Protection Act, 38 M.R.S.A. § 480-A *et seq.*, ("NRPA") to regulate intake structures as required by § 316 (b) of the CWA. Under the NRPA, no person shall, *inter alia,* construct, repair or alter any permanent structure without a permit if the structure is in, on or over any protected natural resource, or is located adjacent to and operated in such a manner that material or soil may be washed into a coastal wetland, great

pond, river, stream or brook or significant wildlife habitat contained within certain freshwater wetlands. The Department may issue a NRPA permit when it finds that the activity will not, *inter alia*: unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses; cause unreasonable soil erosion; unreasonably harm any significant wildlife habitat, freshwater wetland plant habitat, threatened or endangered plant habitat, aquatic habitat, travel corridor, freshwater, estuarine or marine fisheries or other aquatic life; violate any state water quality law; unreasonably cause or increase flooding of the altered area, or adjacent properties; or unreasonably interfere with the natural supply or movement of sand within a sand dune system. In addition, developments of greater size, that may substantially affect the environment, must receive a permit under the State's Site Location Law, 38 M.R.S.A. § 481 *et seq.* Thus under State law, the siting criteria for intake structures is as least as stringent as § 316 (b) of the CWA.

b. Disposal Into Wells.

State law provides authority to issue permits to control the disposal of pollutants into wells.

FEDERAL AUTHORITY: CWA § 402(b)(1)(D); 40 CFR 123.28 and 147.1000.

STATE STATUTORY AND REGULATORY AUTHORITY: 38 MRSA § 413 (1 and 1-B);06-096 CMR Chp. 543.

REMARKS OF THE ATTORNEY GENERAL:

State law requires permits for the discharge of any source of pollution to waters of the State, which include groundwaters. In addition, the State's rules regulating discharges of

pollutants by well injection were approved by EPA, pursuant to section 1422 of the SDWA, effective 9/26/83, and the State's rules have not been amended since promulgation.

2. Authority to Deny Permits in Certain Cases.

State law provides authority to insure that no permit will be issued in any case where:

a . The permit would authorize the discharge of a radiological, chemical, or biological warfare agent or high-level radioactive waste. 38 MRSA § 420 (3);

b. The permit would, in the judgment of the Secretary of the Army acting through the Chief of Engineers, result in the substantial impairment of anchorage and navigation of any waters of the United States. 06-096 CMR Chp. 523, § 10;

c. The permit is objected to in writing by the Administrator of EPA, or his designee, pursuant to any right to object provided to the Administrator under Section 402(d) of the CWA. 38 MRSA §§ 414-A (3) and 464 (4) (A) (7);

d. The permit would authorize a discharge from a point source which is in conflict with a plan approved under Section 208(b) of the CWA. 38 MRSA § 464 (4) (A) (10); or

e. The issuance of the permit would otherwise be inconsistent with the CWA or regulations promulgated thereunder. 38 MRSA § 414-A (1 and 3) .

FEDERAL AUTHORITY: CWA § 301(f), 402(b)(6), 402(d)(2), and 203(e); 40 CFR 122.4, 123.29 and 123.44.

STATE STATUTORY AND REGULATORY AUTHORITY: 38 MRSA §§ 414-A (1 and 3), 420, and 464 (4) (A) (7 and 10); 06-096 CMR Chp. 523, § 10.

REMARKS OF THE ATTORNEY GENERAL:

Consistent with the requirements of 40 CFR 123.25, the Department cannot issue permits in the circumstances described above as prohibited by the specific statutes and rules cited. In addition, pursuant to 38 M.R.S.A. §§ 414-A(1) and 464(4)(A), the Department cannot issue waste discharge licenses for a new source or a new discharger, if the discharge will cause or contribute to the violation of water quality standards.

3. Authority to Apply Federal Standards and Requirements to Direct Discharges.

a. Effluent Standards and Limitations and Water Quality Standards.

State law provides authority to apply in terms and conditions of issued permits applicable Federal effluent standards and limitations and water quality standards promulgated or effective under the CWA, including:

(1) Effluent limitations pursuant to Section 301. 38 MRSA § 414-A (1) (D) and 06-096 CMR Chp. 525;

(2) Water quality related effluent limitations pursuant to Section 302. 38 MRSA § 414-A (1) (A, B and C);

(3) National standards of performance pursuant to Section 306. 38 MRSA § 414-A (1) (D) and 06-096 CMR Chp. 525;

(4) Toxic and pretreatment effluent standards pursuant to Section 307. 38 MRSA § 420 and 06-096 CMR Chp. 530; and

(5) Ocean discharge criteria pursuant to Section 403; 38 M.R.S.A. §§ 414-A (1), 464 (4) (A) (4 – 9, 11), (B) and (F), 465-B.

FEDERAL AUTHORITY: CWA §§ 301(b), 301(e), 302, 303, 304(d), 304(f), 306 and 307, 402(b)(1)(A), 403, 208(e), and 510; 40 CFR 122.44.

STATE STATUTORY AND REGULATORY AUTHORITY: 38 MRSA §§ 414-A (1) (A-D), 420, and 464 (4) (A) (4 – 9, 11), (B) and (F), 465-B; 06-096 CMR Chps. 525 and 530.

REMARKS OF THE ATTORNEY GENERAL:

As provided by the specific statutory and regulatory authorities cited above, State law provides that permits issued by the Department shall contain conditions which apply the applicable effluent limitations and standards of performance listed above. In addition, notwithstanding the absence of specific reference to 40 CFR 125, Subpart M, to state programs, State law provides the Department with ample authority to require compliance with all applicable federal effluent standards and limitations, and water quality standards promulgated or effective under the CWA for ocean discharges, including the aforementioned Subpart M criteria. Under State law, all discharges of pollutants to any surface or subsurface waters that are contained within, flow through, or under or border upon the State, including, but not limited to, the marginal and high seas, require a waste discharge license.

Mixing Zones: State law allows for mixing zones, where appropriate. See, 38 M.R.S.A. § 451 and 06-096 CMR Chp. 530.5 (D). Under § 451, the purpose of a mixing zone is to allow a reasonable opportunity for dilution, diffusion or mixture of pollutants with the receiving waters before the receiving waters will be tested for classification and/or water quality violations. Notwithstanding these provisions, the Department recognizes that there may be situations in which permit conditions must require compliance with water quality standards at the end of the

pipe (e.g., when there already are water quality violations in the receiving waters). See, 38 MRSA § 414-A (1). The State has adequate authority to require compliance with such permit conditions, and § 451 will not interfere with the enforcement of any such conditions. Accordingly, any mixing zone established under § 451 would not alleviate the need for compliance with the State's water quality laws as set forth in 38 MRSA § 414-A, after reasonable opportunity for dilution. Where discharges contain toxic pollutants, Chp. 530.5 (D) sets forth the factors which must be considered, including, but not limited to, numeric water quality criteria, WET effluent limits, dilution modeling and stream design flows when establishing mixing zones. In addition, 38 M.R.S.A. § 464 (4) (D) requires that the assimilative capacity of a river or stream be computed using the minimum 7-day low flow which can be expected to occur with a frequency of once in ten years, and 06-096 CMR Chp. 581 (5) requires a minimum zone of passage for free-swimming and drifting organisms of not less than ¾of the cross-sectional area at any point in the in a receiving body of water.

b. Effluent limitations requirements of Sections 301 and 307 of the CWA.

In the absence of formally promulgated effluent standards and limitations under sections 301(b) and 307 of the CWA, State law provides authority for the DEP to adopt effluent limitations to achieve the purposes of these sections of the CWA using the permitting authority's best professional judgment (BPJ). Such limitations may be based upon an assessment of technology and processes as required under the CWA with respect to individual point sources, and include authority to apply:

(1) To existing point sources, other than publicly-owned treatment works, effluent limitations based on application of the best practicable control technology currently available or the best available technology economically achievable;

(2) To publicly-owned treatment works, effluent limitations based upon the application of secondary treatment; and

(3) To any point source, as appropriate, effluent standards or prohibitions designed to prohibit the discharge of toxic pollutants in toxic amounts or to require pretreatment of pollutants which interfere with, pass through, or otherwise are incompatible with the operation of publicly-owned treatment works.

FEDERAL AUTHORITY: CWA §§ 301, 304(d), 307, 402(a)(1) and 402(b)(1)(A); 40 CFR 122.44.

STATE STATUTORY AND REGULATORY AUTHORITY: 38 MRSA § 414-A (1) (D); 06-096 CMR Chps. 523, § 15 and 524, § 2.

REMARKS OF THE ATTORNEY GENERAL:

The effluent limitations and standards of performance listed above can be applied by the Department under the authority of the cited statutes and regulations.

c. Schedules of Compliance.

State law provides authority to set and revise schedules of compliance in permits which require the achievement of applicable effluent standards and limitations within the shortest reasonable time consistent with the requirements of the CWA. This includes authority to set interim compliance dates in permits, which are enforceable without otherwise showing a violation.

FEDERAL AUTHORITY: CWA §§ 301(b), 303(e), 304(b), 303(e), 304(b), 306, 307, 402(b)(1)(A), 502(11) and 502(17); 40 CFR 122.47 and 122.62.

STATE STATUTORY AND REGULATORY AUTHORITY: 38 MRSA § 414-A (2); 06-096 CMR Chps. 522, § 13 and 523 § 7.

REMARKS OF THE ATTORNEY GENERAL:

Section 414-A (2) of Title 38 provides that the State may issue permits with schedules of compliance for new or more stringent technology-based requirements, consistent with the time limitations permitted for compliance under the CWA. Accordingly, no technology-based permits incorporating schedules of compliance can be issued if the schedules are inconsistent with federal law.

d. Variances.

State law provides authority for the State to review and act upon variances from applicable effluent limitations. To the extent that the State will consider variances, the State provisions are at least as stringent as federal requirements. State law does not allow any variances or adjustments to permit limitations that would violate the CWA.

STATE STATUTORY AND REGULATORY AUTHORITY: 38 MRSA § 414-A (3 and 4); 06-096 CMR Chp. 522 § 13.

e. POTWs.

State law provides authority to regulate sewers, pipes and other conveyances which convey wastewater to Publicly Owned Treatment Works ("POTWs"), including regulating Combined Sewer Overflows and Sanitary Sewer Overflows, and requiring proper operation and maintenance. The State's definition of POTW in 06-096 CMR Chp. 520 covers any facility for the treatment of pollutants, owned by the public entity. This includes sewers, pipes and other conveyances which convey municipal sewage. Thus the State definition is at least as broad as the federal definition of POTWs in 40 CFR 122.2.

REMARKS OF THE ATTORNEY GENERAL:

The granting of a variance is discretionary under 06-096 CMR Chp. 522, § 13 and the Department has sufficient authority to incorporate any CWA requirements concerning variances. In addition, all variances are subject to EPA objection under 40 CFR 123.44. 38 M.R.S.A. § 464 (4) (A) (7).

4. Authority to Limit Permit Duration.

State law provides authority to limit the duration of permits to a fixed term not exceeding five years. If a permittee files a timely and sufficient application for renewal of a permit, State law provides for the automatic continuance of expired permits until action has been taken on the renewal, except where the continued well-being of a significant natural resource would be jeopardized by such renewal.

FEDERAL AUTHORITY: CWA § 402(b)(1)(B); 40 CFR 122.6, 122.46.

STATE STATUTORY AND REGULATORY AUTHORITY: 38 MRSA §§ 414 (2), 414-A (1-B) (D); and 5 M.R.S.A. § 10002.

REMARKS OF THE ATTORNEY GENERAL:

Section 414 (2) of Title 38 provides that waste discharge licenses may be issued for a term of not more than 5 years, except that licenses for overboard discharges may be issued for a term of not more than 10 years, until the State receives authority to issue permits under the CWA at which time the term of any overboard discharge may not be more than 5 years. The State Administrative Procedures Act, 5 M.R.S.A. § 10002, provides for an administrative continuance of licenses when the licensee files a timely and complete application for renewal of a license.

5. Authority for Entry, Inspection and Sampling; and Applying Monitoring, Recording and Reporting Requirements to Direct Discharges.

State law provides authority to:

a. Require any permit holder or industrial user of a publicly owned treatment works to:

(1) Establish and maintain specified records;

(2) Make reports;

(3) Install, calibrate, use and maintain monitoring equipment or methods (including where appropriate biological monitoring methods);

(4) Take samples of effluent (in accordance with such methods, at such intervals, and in such a manner as may be prescribed); and

(5) Provide such other information as may reasonably be provided.

b. Enable an authorized representative of the State, upon presentation of such credentials as are necessary, to:

(1) Have a right of entry, to, upon, or through any premises of a permittee or of an industrial user of a publicly-owned treatment work on which premises an effluent source is located or in which any records are maintained;

(2) At reasonable times have access to and copy any records required to be maintained;

(3) Inspect any monitoring equipment or method which is required; and

(4) Have access to and sample any discharge of pollutants to State waters or to publicly-owned treatment works resulting from the activities or operations of the permittee or industrial user.

FEDERAL AUTHORITY: CWA §§ 304(h)(2)(A and B), 308(a), 402(b)(2), and 402(b)(9); 40 CFR 122.41(i) and (j) (1), 122.42(a), 122.44(i), and 122.48.

STATE STATUTORY AND REGULATORY AUTHORITY: 38 MRSA §§ 347-C and 414 (3) and (3-B).

REMARKS OF THE ATTORNEY GENERAL:

Under federal law, the State must have the authority to enter any permitted site in order to inspect records, monitor, or otherwise investigate compliance. 40 CFR § 123.26 (c) states:

> The State Director and State officers engaged in compliance evaluation shall have authority to enter any site or premises subject to regulation or in which records relevant to program operation are kept in order to copy any records, inspect, monitor or otherwise investigate compliance with the State program including compliance with permit conditions and other program requirements. . . .

Under 38 MRSA §§ 347-C and 414 (3), the State has the authority required under 40 123.26 (c). 38 MRSA § 347-C states that,

> [e]mployees and agents of the Department of Environmental Protection may enter any property [to] inspect records relevant to any regulated activity."

38 MRSA § 414 (3) states that,

> "[a]uthorized representatives or the commissioner and the Attorney General shall have access at any reasonable time, to and through any premises where a discharge originates or is located or where required records are kept . . .

Accordingly, the State has the authority required by 40 CFR 123.26(c).

Under 38 MRSA § 414 (3-B), overboard dischargers ("OBDs") may avoid mandatory state inspections and inspection fees by arranging for private maintenance contracts and private inspections. Notwithstanding the provisions of § 414 (3-B), the State retains the inspection authorities set forth in §§ 347-C and 414 (3). Although § 414 (3-A) provides for the waiver of inspection and reduction of fees for inspection of OBDs, the inspection does not diminish the Department's right to enter and inspect under §§ 347-C and 414.

6. Authority to Issue Notices, Transmit Data, and Provide Opportunity for Public Hearings.

State law provides authority to comply with requirements of the CWA and EPA Guidelines for "State Program Submissions," 40 CFR Part 123 (hereinafter "the Guidelines") to:

a. Notify the public, affected States, and appropriate governmental agencies of proposed actions concerning the issuance of permits;

Function 6 (b): 06-096 CMR Chp. 522, § 8.

Function 6 (c): 06-096 CMR Chp. 522, §§ 8 – 11

REMARKS OF THE ATTORNEY GENERAL:

Public Notice. Upon filing of an application for a waste discharge license, State law provides for public notice of the application, including: (1) the filing of the application with the municipal offices where the project is located, or in the case of the unorganized territories, with the county commissioners; (2) the publication in a local newspaper; and (3) the notice by certified mail of abutters. 38 M.R.S.A. § 344 (1); 06-096 CMR Chp. 2, §§ 7 (G), 9 and 18, Chp. 522, § 8. The Department is obligated to maintain a list of interested persons who will be mailed draft licenses. 06-096 CMR Chp. 2, § 18. Similarly, 38 MRSA § 414-A (5) provides for notice of proposed permit modifications "to the licensee and all other interested parties of record." Section 344 (4-A) of Title 38 provides that there shall be public comment periods on draft permits of at least five working days (fifteen working days when permit applications are pending before the Board). Notwithstanding these minimum time periods, 06-096 CMR Chp. 522, § 8 (e) requires that persons provided with draft permits shall have at least 30 days in which to submit comments on the draft or to request a public hearing. Thus, the minimum comment periods set forth in 38 M.R.S.A. § 344 (4-A), applicable generally to all permits issued by the Department, do not interfere with the federally required thirty-day notices for waste discharge licenses.

Public Hearings. 38 MRSA § 345-A and the Maine Administrative Procedures Act, 5 MRSA § 8001 *et seq.*, authorize adjudicatory hearings on permits. The State's authority to hold public meetings, however, is not limited to adjudicatory hearings. The Department may hold public meetings to receive information on any pending application on a less formal basis.

06-096 CMR Chp. 2, § 13 (C). Therefore, the Department has the authority to hold appropriate public meetings, as required by federal regulations.

7. Authority to Provide Public Access to Information.

State law provides authority to make information available to the public, consistent with the requirements of the CWA and 40 CFR Part 123, including the following:

a. The following information is available to the public for inspection and copying:

(1) Any NPDES permit, permit application, or form;

(2) Any public comments, testimony or other documentation concerning a permit application; and

(3) Any information obtained pursuant to any monitoring, recording, reporting, or sampling requirements or as a result of sampling or other investigatory activities of the State.

b. The State may hold confidential any information (except effluent data, permits and permit applications) shown by any person to be information which, if made public, would divulge methods or processes entitled to protection as trade secrets of such person.

FEDERAL AUTHORITY: CWA §§ 304(h)(2)(B), 308(b), 402(b),(2) and 403(j); 40 CFR Part 2 and 122.7.

STATE STATUTORY AND REGULATORY AUTHORITY: 1 M.R.S.A. §§ 402(3), 408 and 38 M.R.S.A. § 414 (6).

REMARKS OF THE ATTORNEY GENERAL:

All information obtained in the processing of a waste discharge application is available to the public, except upon a satisfactory showing by any person that any records, reports or information, or a part thereof, if made public would divulge methods or processes that are entitled to protection as trade secrets. 1 M.R.S.A. §§ 402(3), 408 and 38 M.R.S.A. § 414 (6).

8. Authority to Terminate or Modify Permits.

State law provides authority to terminate or modify permits for cause including, but not limited to, the following:

a. Violation of any condition of the permit (including, but not limited to, conditions concerning monitoring, entry, and inspection).

b. Obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts; or

c. Change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

FEDERAL AUTHORITY: CWA § 402(b)(1)(C); 40 CFR 122.41(f), 122.62 and 122.63.

STATE STATUTORY AND REGULATORY AUTHORITY: 38 M.R.S.A. §§ 341-D, 344 (9), 413 (3) and 414-A (5); 06-096 CMR Chps. 522 § 4 , 523 § 2 (f), and 2 §§ 1 and 23.

REMARKS OF THE ATTORNEY GENERAL:

Modification, Revocation or Suspension. Pursuant to 38 MRSA § 341-D, the Board has the authority to seek termination or modification of any license through an administrative court proceeding. That remedy, however, is not exclusive. Under 38 MRSA § 414-A (5) (C), the Board itself may modify, revoke or suspend a waste discharge license when it finds that any of the

conditions specified in section 341-D (3) exist, or upon an application to transfer a license. Section 341-D authorizes revocation or suspension when the Board finds, among other things, that:

a. The licensee has violated any condition of the license;

b. The licensee has obtained a license by misrepresenting or failing to disclose fully all relevant facts;

c. The licensed discharge or activity poses a threat to human health or the environment;

d. The license fails to include any standard or limitation legally required on the date of issuance;

e. There has been a change in any condition or circumstance that requires revocation, suspension or a temporary or permanent modification of the terms of the license; or

f. The licensee has violated any law administered by the Department.

In addition to authorizing the Department to modify, reopen or terminate a license, 38 MRSA § 414-A (5) (B) (1) provides that permittees may request modifications of licenses "for any valid cause or changed circumstance." While this provision gives the permittee the right to request a modification the State must apply all State and federal procedural and substantive requirements when reviewing any request for modification, including all public notice and water quality laws.

Subsection (B) further provides that the Department may initiate a license modification when: (1) necessary to correct legal, technical or procedural mistakes or errors; (2) there has been or will be a substantial change in the activity or treatment; (3) new information, other than

revised rules, guidance or test methods becomes available that would have justified different license conditions at the time of issuance; (4) a new pollutant is discovered in the discharge in quantities sufficient to require treatment; (5) necessary to remove net limits; (6) necessary to make changes due to the failing of one state to notify another whose waters may be affected; and (7) necessary to include federally required pre-treatment compliance schedules.

Reopening Licenses for Toxic Compounds. 38 MRSA § 414-A (5) (A) incorporates the authority required for delegation in 40 CFR § 122.62 (a) (6), (7) in relation to toxic compounds listed at 40 CFR 401. Under § 414-A (5) (A), the Department may reopen a license to add or change conditions or effluent limitations for toxic compounds, include schedules of compliance and include reopener provisions in permits at the time of the issuance when changed circumstances or new information may be anticipated.

Transfers and "Minor" Modifications. 122.61 provides that in order to transfer a permit from a prior to a new owner or operator, a formal permit modification, or revocation and reissuance procedure, with opportunity for public comment, must be used for transfers which meet the automatic transfer criteria set out in 40 CFR § 122.61 (b) or the minor modification criteria set out in 40 CFR § 122.63 (d). Sections 344 (9) and 413 (3) of Title 38 provide for permit transfers through either new permit or permit transfer proceedings. 38 MRSA § 344 (9) states, "For purposes of this section, a request for a license or permit renewal or transfer is considered an application." Accordingly, permit transfer applications are subject to the same public participation requirements as new permit applications.

Under 06-096 CMR Chp. 2 §§ 1 and 23, applications for "minor revisions" must be submitted to the Department, and written approval must be received, prior to undertaking the modification. "Minor revisions" are defined as "any proposal to modify a license previously granted by the Department, where the modification does not significantly expand the project, change the nature of the project or modify any Department findings with respect to licensing criteria." 06-096 CMR Chp. 2 §§ 1 and 23.

9. Authority to Enforce the Permit and the Permit Program.

State law provides authority to:

a. Abate violations of:

(1) Requirements to obtain permits;

(2) Terms and conditions of issued permits;

(3) Effluent standards and limitations and water quality standards (including toxic effluent standards and pretreatment standards applicable to dischargers into publicly owned treatment works); and

(4) Requirements for recording, reporting, monitoring, entry, inspection, and sampling.

b. Apply sanctions to enforce violations described in paragraph (a) above, including the following:

(1) Injunctive relief, without the necessity of a prior revocation of the permit;

(2) Civil penalties;

(3) Criminal penalties for willful or negligent violations; and

(4) Criminal penalties against persons who knowingly make any false statement, representation or certification in any forms, notice, report, or other document required by the terms or conditions of any permit or otherwise required by the State as part of a recording, reporting, or monitoring requirement.

c. Apply maximum civil and criminal penalties and fines which are comparable to the maximum amounts recoverable under Section 309 of the CWA, or which represent an actual and substantial economic deterrent to the actions for which they are assessed or levied. Each day of continuing violation is a separate offense for which civil and criminal penalties and fines may be obtained.

FEDERAL AUTHORITY: CWA §§ 402(b)(7), 309, 304(a)(2)(C), 402(h), and 504; 40 CFR 123.26 and 123.27.

STATE STATUTORY AND REGULATORY AUTHORITY: 4 M.R.S.A. § 152 (6-A), 38 M.R.S.A. §§ 342 (7), 348, 349, 413 (1) and 414 (5); and Maine Rules of Civil Procedure, Rule 80K.

REMARKS OF THE ATTORNEY GENERAL:

Penalties and Restoration. Sections 348 and 349 of Title 38 satisfy the federal enforcement requirements by authorizing the Attorney General to seek penalties in a court of competent jurisdiction for each day of each violation of any provision of the laws administered by the Department, including without limitation, a violation of the terms or conditions of any order, rule, license, permit, approval or decision of the Board or Commissioner. The Attorney General is authorized to seek, among other things, restoration of any area affected by any violation and/or

civil penalties, or institute a criminal action for any person who intentionally, knowingly, recklessly or with criminal negligence violates the laws administered by the Department. In addition, an employee of the Department certified by the Commissioner to enforce the laws administered by it, may represent the State in district court by filing a Land Use Citation and Complaint seeking equitable relief and penalties. 4 M.R.S.A. § 152 (6-A) (N); 38 M.R.S.A. § 342 (7); Maine Rules of Civil Procedure, Rule 80K.

Standard of Proof. Under State law, the Department is not required to prove that a discharge causes pollution before bringing an enforcement action under 38 M.R.S.A. § 348. An

348 may be initiated if a person violates 38 M.R.S.A. § 413 by causing a direct or indirect discharge of any pollutant without first obtaining a license from the Department. Therefore, the Department need only show that a discharge will occur or has occurred in order to bring the action.

Injunctive Relief. Section 348 of Title 38 states that injunctive relief is available "in the event of a violation," but does not specifically state that such relief is available for threatened

123.27 (a) (2). Similarly, § 348 does not specifically state that temporary restraining orders (TROs) are available when there is endangerment or damage to public health or the environment, as required under 40 CFR § 123.27 (a) (1). In practice, however, the Attorney General has interpreted and applied these sections to allow the Department to seek TROs and injunctions at any time a violation is threatened, regardless of whether a violation is actually occurring. Therefore, threatened violations, violations which have occurred

and violations which are ongoing would all be subject to equitable relief under the present State statutory enactments and rules.

Economic Benefit. Sections 349 (2) and (8) of Title 38 state, respectively:

> (2) Any person who violates any provision of the laws administered by the department or terms or conditions of any order, rule, license, permit, approval or decision of the board shall be subject to a civil penalty, payable to the State, or not less than $100 nor more than $10,000 for each day of that violation or, if the violation relates to hazardous waste, of not more than $25,000 for each day of the violation.
>
> (8) If the economic benefit resulting from the violation *exceeds* the applicable penalties under subsection 2, the maximum civil penalties may be increased for each day of violation. The maximum civil penalty may not exceed an amount equal to twice the economic benefit resulting from the violation, or the amount allowed in subsection 2, whichever is greater. (emphasis added)

In cases where the economic benefit of a violation exceeds the statutory maximum, then subsection (8) authorizes increases in penalties of twice the economic benefit. Subsection (8) does not impose a cap on penalties otherwise prescribed under 38 M.R.S.A. § 349 (2). Thus, the State is authorized to seek a maximum penalty of $10,000 per day for each violation, and may increase that amount if the economic benefit of the violation exceeds the amount of the maximum per day fine.

Supplemental Environmental Projects. Pursuant to 38 M.R.S.A. § 349(2-A), in the settlement of a civil enforcement action, the Department may agree to a supplemental environmental project ("SEP") that mitigates not more than 80% of a penalty. The project, among other things, must primarily benefit public health or the environment, and not otherwise be required or likely to be performed by the violator. Under § 349(2-A), civil penalties will be

foregone to no greater extent or manner than that allowed under EPA's SEP policy, effective May 1, 1998.

Compliance Orders. While the Department does not have authority to issue penalty orders, it does have the authority to issue compliance orders under 38 MRSA § 347-A (2). Subsection (2) states,

> After hearing, or in the event of a failure of the alleged violator to appear on the date set for such a hearing, the commissioner shall, as soon as practicable, make findings of fact based on the record and, if the commissioner finds that a violation exists, shall issue an order aimed at ending the violation. The person to whom an order is directed shall immediately comply with the terms of that order.

Accordingly, the Department will have sufficient powers at its disposal to effectively carry out enforcement of the delegated program.

10. Public Participation.

State law is consistent with 40 CFR § 123.27 (d)(2) which provides for public participation in the states' enforcement processes by assuring that the states will: (1) investigate and provide written responses to citizen complaints; (2) allow for permissive citizen intervention in state court and administrative actions, and not oppose such intervention when sought; and (3) publish notice and provide at least a thirty-day public comment period on any proposed settlement of a state enforcement action, before the settlement becomes final. In addition, State law allows any "interested person" to appeal the approval or denial of state permits in a State court of competent jurisdiction.

FEDERAL AUTHORITY: CWA §§ 309 and 505; 40 CFR 123.27 and 123.30.

STATE STATUTORY AND REGULATORY AUTHORITY: 5 M.R.S.A. § 11001, 38 MRSA §§ 346, 347-A(4) (D) and (6) (A-C); 06-096 CMR Chp. 2 §§ 1(B) and 21(B and D).

REMARKS OF THE ATTORNEY GENERAL:

Citizen Complaints. Pursuant to the Memorandum of Agreement ("MOA") between the State of Maine Department of Environmental Protection and the United States Environmental Protection Agency, Region I, as set forth in the DEP Program Description, the Maine DEP has agreed to investigate and provide appropriate responses to citizen complaints concerning any violations. The MOA furthers the Department's statutory purpose to: protect, preserve and enhance the natural environment; prevent, abate and control pollution; and protect the public's right to use and enjoy the State's natural resources. 38 M.R.S.A. § 341-a (1).

Enforcement Actions. Under 38 MRSA § 347-A (6) (A and B), after delegation, in any civil enforcement action involving discharges regulated under the CWA, the Department shall publish notice of and provide at least 30 days for public comment on any proposed settlement before it is approved by the Board, in the case of administrative consent agreements, or the court, in the case of judicial actions. Section 347-A (4) (D) of Title 38 also provides the public with an opportunity to make written comments on administrative consent agreements, at the Board's discretion, at the time that the agreement is being considered for approval. Under 38 MRSA § 347-A (6) (C), the Attorney General reserves his/her right to (1) withdraw or withhold his/her consent to the proposed judgment if the comments, views or allegations concerning the judgment

disclose facts or considerations that indicate that the proposed judgment is inappropriate, improper or inadequate; and (2) oppose an attempt by any person to intervene in the action.

When the public interest in this notification process is not compromised, the Attorney General may permit an exception to publication in a specific case where extraordinary circumstances require a period shorter than 30 days or an alternative notification procedure. Thus the allowance found in § 347-A (6) (C), for modification of the public comment period in extraordinary circumstances, is consistent with 40 CFR § 123.28 (d) (2), as interpreted by the U.S. Department of Justice. In addition, to the extent required by 40 CFR 123.27 (d) (2) (ii), the Attorney General will not oppose intervention when permissive intervention is authorized by statute or regulation.

Appeal of Permits. Under 40 CFR 123.30, state law must allow any "interested person" to appeal the approval or denial of state permits in state court. Under Maine law, any person who is aggrieved by a final agency action, such as the issuance or denial of a waste discharge permit, is entitled to judicial review. 5 M.R.S.A. § 11001 and 38 M.R.S.A. § 346. In addition, a waste discharge license issued by the Commissioner may be appealed to the Board, or directly to the court, and the Board's decision of the appeal of a license issued by the Commissioner may be appealed to the court. 06-096 CMR Chp. 2 § 21 (B and D). For the purposes of judicial appeals of licensing decisions, an "interested person" under federal law is equivalent to an "aggrieved person," who under State law is defined in at least as broad a manner as an "interested person," under federal law.

In Fitzgerald v. Baxter State Park Authority, 385 A.2d 189 (Me. 1978), the Maine Supreme Judicial Court ("Law Court") addressed the question of whether individuals had the necessary standing to challenge a decision of a State agency. In particular, the court was confronted with the question "whether individual plaintiffs, [who were] citizens, domiciliaries, voters and property owners [of the state of Maine], and actual users of Baxter State Park, have standing to obtain injunctive relief against a state agency's proposed program." Id. at 196. In holding that those citizens did have standing to challenge the State agency's action, the court stated, "Any citizen of Maine who shows himself to have suffered particularized injury as a result of action of the [State agency] has standing to obtain judicial review and to seek injunctive relief against that proposed action." Id. at 197. This test is at least as inclusive as that articulated by the United States Supreme Court in Babbitt v. United Farm workers National Union, 442 U.S. 289, 299 (1979), ("[a] plaintiff who challenges a statute must demonstrate a *realistic* danger of sustaining a direct injury *as a result of* the statute's operation or enforcement.").

By analogy, to be an interested party, with sufficient standing to challenge the approval or denial of a state permit under the delegated NPDES program in state court, an individual would need to make the showing that he or she would be injured, in some manner, as a direct result of the permit's issuance or denial. A challenger, therefore, needs only establish some personalized effect of the permit, as, for example, a regular user of a particular water body, an abutting land owner, or an organization representing such persons.

Finally, although 38 M.R.S.A. § 346 (3) prohibits a riparian or littoral owner on any waterbody from filing an action at law or in equity against any licensed discharger, it is limited to

causes of action based on the fact that: (1) such a licensee is not a riparian or littoral owner on the waterbody; or, (2) the licensed discharge will prevent the owner from having the reasonable use and enjoyment of the waterbody, provided that the licensed discharge will not cause or contribute the lowering of any statutory classification or cause actual damages to the riparian or littoral owner. Section 346 (3) does not, therefore, impede the ability of an aggrieved party to appeal a permit under 5 M.R.S.A. § 11001, 38 M.R.S.A. § 347-A (4) (D) or (6), or 06-096 CMR Chp. 2 §§ 1 (B) and 21 (B and D). Instead, it is intended to provide a shield to a permit holder if the permittee complies with the terms of its permit, and does not cause or contribute to the lowering of any water classification, or cause actual damages to any riparian or littoral owner.

11. Conflict of Interest: State Board Membership.

No State board or body which has or shares authority to approve permit applications or portions thereof, either in the first instance or on appeal, includes (or will include, at the time of approval of the State permit program), as a member, any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit. No State law requires representation on the State board or body which has or shares authority to issue permits of any person who would violate the conflict of interest provision contained in 40 CFR 123.25 (c).

FEDERAL AUTHORITY: 40 CFR 123.25 (c).

STATE STATUTORY AND REGULATORY AUTHORITY: 38 MRSA § 341-A (3) (B) and 341-C (8).

REMARKS OF THE ATTORNEY GENERAL:

Sections 341-A (3)(B) and 341-C (8) of Title 38 fulfill the federal conflict of interest requirements of 40 CFR 123.25 (c). Although §§ 341-A (3)(B) and 341-C (8) do not specifically define "income" or "permit holder," under State law these terms are at least as broad as the federal definitions thereof contained in 40 CFR § 123.25 (c).

12. Incorporation by Reference.

State law provides authority for the Department to incorporate federal legal authority by reference. The incorporation by reference is proper and enforceable under State law. 5 M.R.S.A. § 8056 (1) (B). State law does not, however, permit the prospective incorporation of federal law. Attorney General Report 1949-50, p. 230 (to enact legislation adopting standards which may change by the action of some agency not within the control and direction of the Legislative is invalid). Under 38 M.R.S.A. § 361-A, the date of incorporation into State law of the CWA, and regulations promulgated thereunder, is January 1, 1997. For purposes of the State's regulations, the Department referenced the federal regulations of the USEPA effective as of July 1, 1998. 06-096 CMR Chp. 520, Section 1. Chapter 520 was duly adopted by the Department and will become effective upon the approval of the State's application to administer the NPDES program by the USEPA. Pursuant to its regulations, the Department may require compliance with applicable federal regulations in effect on July 1, 1998.

STATE STATUTORY AND REGULATORY AUTHORITY: 5 M.R.S.A. § 8056 (1) (B); 38 M.R.S.A. §§ 341-D (1-B) and 361-A; 06-096 CMR Chp. 520, Section 1.

13. Authority to Issue General Permits.

State law provides the Department with the authority to issue and enforce general permits in accordance with the federal general permits regulation at 40 CFR 122.28.

FEDERAL AUTHORITY: CWA § 402(a); 40 CFR 122.28, 123.2 and 123.27.

STATE STATUTORY AND REGULATORY AUTHORITY: 06-096 CMR Chp. 529.

REMARKS OF THE ATTORNEY GENERAL:

State law provides the Department with authority to issue and enforce general permits for the discharge of certain pollutants to waters of the State. These permits, once issued, are subject to the full range of enforcement provisions provided under State law.

14. Other:

a. Treatment of Maine Indian Tribes as States.

Under certain circumstances not applicable in Maine, the Regional Administrator may treat an Indian tribe recognized by the Secretary of the Interior as a State for purposes of NPDES program authority. CWA § 518 (e); 40 CFR 123.31 - 123.34.

As a result of the Passamaquoddy Tribe and Penobscot Indian Nation's claims to portions of Maine's lands, the federal government, the Indian tribes and the State negotiated a settlement of land claims and jurisdictional issues. The settlement is set forth in Maine Indian Land Claim Settlement Act, 25 U.S.C. §§ 1721-35, and Maine Indian Claim Settlement Act, 30 M.R.S.A. §§ 6201-14. The settlement and the legislation memorializing it were designed "to create a

unique relationship between State and Tribal authority." *Passamaquoddy Tribe v. State of Maine*, 75 F.3d 784, 787 (1st Cir. 1996). [1]

The Settlement Acts "rid the State of all Indian land claims and submitted [the Indian tribes] ... and their tribal lands to the State's jurisdiction [, and] ... gave the State a measure of security against future federal incursions upon these hard-won gains." *Passamaquoddy Tribe,* 75 F.3d at 787. The Settlement Acts set the framework that would "govern matters of common political concern to the State and" the State's Indian tribes. *Id*.

> It was generally agreed that the acts set up a relationship between the tribes, the state, and the federal government different from the relationship of Indians in other states to the State, and the federal governments ... We, therefore, look not to federal common law .... but to the statute itself and to its legislative history.

Penobscot Nation v. Stilphen, 461 A.2d 478, 487 (Me. 1983). The Settlement Acts prescribe that members of Maine's Indian tribes are to be treated exactly the same as any other person, except as otherwise prescribed in the State Act. 30 M.R.S.A. § 6204. Neither the Settlement Acts nor the Clean Water Act support the notion that the EPA has a "special relationship" with Maine's Indian tribes.

The structure of the land claim settlement, as set out in the Federal and State Acts, clearly argues against a claim to a "special" right to have EPA act as the trustee for Maine's Indian

[1] Tribal rights are subject to the plenary authority of Congress to delimit the sovereignty and rights of a tribe. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 1676 (1978). Tribes no longer possess the full attributes of sovereignty; and tribal sovereignty "exists only at the sufferance of Congress and is subject to complete *Id.*; *United States v. Wheeler*, 435 U.S. 313, 323, 98 S.Ct. 1074, 1086 (1978). Tribal sovereignty may be eliminated by treaty, statute or necessary implication. *Id*. Moreover, a tribe's attributes of sovereignty, to the extent they exist, do not negate the fact that its reservation is part of a state. *Chemehuevi Indian Tribe v. California State Board*, 800 F.2d 1446, 1450 (9th Cir. 1986).

tribes. General Indian common law, used as the basis for the proposition that EPA has a trustee relationship with all Indian tribes, cannot be relied upon in the State of Maine. The Settlement Acts dealt with the Maine Indian tribes in a manner "unlike that which exists anywhere else in the United States." Comments of the Penobscot Nation's Counsel, quoted in *Penobscot Nation v. Stilphen*, 461A.2d at 488. Thus, in dealing with Maine's Indian tribes, we look not to federal common law but to the statutes themselves. *Id*. at 489. Accordingly, case law setting forth EPA's responsibilities elsewhere in the country does not apply in Maine.

Indeed, Congress made clear that federal regulations and statues generally applicable to Indians would not apply in Maine:

> [N]o law or regulation of the United States (1) which accords or relates to a special status or right of or to any Indian, Indian Nation, tribe or band of Indians, Indian lands, Indian reservations, Indian country , Indian territory or land held in trust for Indians and also (2) which affects or preempts the civil, criminal or regulatory jurisdiction of the State of Maine, including, without limitation, laws of the State relating to land use or environmental matters, shall apply within the State.

25 U.S.C. 1725(h). Further, Congress went on to provide that,

> The provisions of any federal law enacted after October 10, 1980, for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes or bands of Indians, as provided in this subchapter in the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted federal law is specifically made applicable within the State of Maine.

25 U.S.C. 1735 (b). Thus, general Federal Indian law existing in 1980 or enacted thereafter does not benefit the Indian tribes of the State of Maine if it affects or preempts State law.

6204. This principle was specifically "approved, ratified and confirmed" by Congress. 25 U.S.C. § 1725(b)(1).[2]

These provisions are consistent with a statement by the attorney for the tribes at the time of settlement that federal Indian law was excluded in Maine "in part because that was the position the State held to in the negotiations .... [and] it is also true to say that the Tribes are concerned about the problems that existed in the West because of the pervasive interference and involvement of the Federal Government in internal tribal matters." Hearings before the Senate Committee on Indian Affairs on S. 2829, 96 Cong. 2d Sess. 181-82 (1980). These statutes are designed to protect against any incursion upon Maine's law by federal law which might otherwise give a special status to either Indians or Indian lands. "Laws" include not only statutes, but "common

See Penobscot Nation v. Stilphen, 461 A.2d 489; 25 U.S.C. § 1722(d) (defining "laws" of the State to include common law).

A "complex statutory and regulatory scheme .... governs our Nation's waters, a scheme which implicates both federal and state administrative responsibilities." *PUD No. 1 v. Washington DPT Department of Ecology*, 511 U.S. 700, 704 (1994). Generally, the states and EPA share duties in achieving the goals of the Clean Water Act but the primary responsibility for establishing water quality standards is left to the states. 33 U.S.C. § 1251(d); *NRDC v.*

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[2] As the Maine Supreme Judicial Court noted in *Penobscot Nation v. Stilphen*, 461 A.2d 478, 488-89 n.7 (Me. 1983), *appealed dismissed for want of a substantial federal question*, 464 U.S. 923 (1983), the attorney for the

U.S.E.P.A., 16 F.3d 1395, 1399 (4th Cir. 1993). EPA reviews the state-implemented standards, with approval and rejection power. 33 U.S.C. § 1313(c). The state must establish narrative or numeric criteria for various pollutants. *Id*. Permits to individual facilities under the NPDES program must be protective of these standards. 33 U.S.C. § 1311(b) and (c). These permits are issued by the EPA or by states that have been delegated NPDES permitting authority. 33 U.S.C. § 1342. Nothing in these provisions specifically provides a role for Maine tribes. Indeed, EPA itself has noted:

> [The provisions of the 1980 Federal Act] seem to invalidate federal laws that might give [Maine Indians] special status .... if it would "affect or preempt" the states' authority, including the state's jurisdiction over environmental and land use matters. ....[A]ny post-1980 special federal legislative provisions that might give Indians special jurisdictional authority .... could not provide [Maine's Indians] with such jurisdictional authority unless the federal legislation specifically addressed Maine and made the legislation applicable within Maine.

U.S.E.P.A. Memorandum: Penobscot's Treatment as a State under CWA § 518(e) for Purposes 106 Grant, at 8 (July 20, 1993).

In 1980, the Senate Committee Report listed the Clean Air Act, 42 U.S.C. § 7474, as an example of a federal statute which accords special rights to Indian tribes and Indian lands but which would <u>not</u> be applicable in Maine because it would interfere with the State air quality laws. S.Rep.No. 96-957, 96 Cong., 2d Sess. 31 (1980). The specific section of the Clean Air Act which the Senate Committee Report cites as being inapplicable in Maine, 42 U.S.A. § 7474, is a provision that permits tribes to supplant state air quality standards by designating their own air quality standards for tribal lands. The Clean Water Act now has a similar provision.

Tribes at the time of settlement acknowledged that the subjection of the Tribes to state jurisdiction was the essential

The Water Quality Act of 1987 authorized the EPA to treat an Indian tribe as a state when dealing with water quality standards, limitations, permitting, and enforcement. 33 U.S.C. § 1377(e). However, Congress clearly intended that

> This section does not override the provisions of the Maine Indian Claim Settlement Act (25 U.S.C.§ 1725). Consistent with subsection (h) of the Settlement Act, the tribes addressed by the Settlement Act are not eligible to be treated as States for regulatory purposes ....

Section-By-Section Analysis Prepared by The Hon. James J. Howard, Chairman of the House Committee on Public Works and Transportation, 2 1987 U.S.C.C.A.N. at 43. Congress, clearly, understood that in Maine the Indian tribes received no special status.[3] Accordingly, EPA has no "special relationship" with Maine's Indian tribes.

b. "Unfunded State Mandates."

Article IX, section 21 of the Maine Constitution (amended in 1992) provides:

> For the purpose of more fairly apportioning the cost of government and providing local property tax relief, the State may not require a local unit of government to expand or modify that unit's activities so as to necessitate additional expenditures from local revenue unless the State provides annually 90% of the funding for these expenditures, from State Funds not previously appropriated to that local unit of government. Legislation implementing this section or requiring a specific expenditure as an exception to this requirement may be enacted upon the vote of 2/3 of all members elected to each House. This section must be liberally construed.

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quid pro quo which the Tribes had to offer to obtain the State's agreement to a settlement.

[3] More recently the United States Department of the Interior recognized that the intent of these statues is "to limit the applicability of the provisions of the ... Clean Water Act (CWA) ... which accord Indian tribes the opportunity to assume state status or otherwise affect the exercise of state authority ..." United States Department of the Interior's Response to Comments, Bangor Hydro-Electric Co., FERC Project No. 2534, at 20 (April 9,1997).

This provision applies only to new requirements. The substantive water quality laws underlying the delegated NPDES program requirements are pre-existing requirements, not subject to the State constitutional provision's limitations. In addition, the right to discharge pollutants into waters of the State is a privilege granted by the State, not a requirement. Thus, the terms and conditions necessary to obtain a waste discharge license are not subject to the State constitutional provision's limitation. and that provision will not impinge on the States ability to implement the delegated NPDES program.

c. Small Business Policy. Under 38 M.R.S.A. § 343-C, the DEP developed a written policy for responding to violations by small businesses discovered as a result of the business requesting compliance assistance. The policy outlines the conditions under which the Department may refrain from initiating formal enforcement action and/or forego civil penalties, but the policy shall be "in conformity with federal requirements." Accordingly, under the State's small business technical assistance policy, civil penalties may be forgone only to the extent and in the manner allowed by federal law.

II. ATTORNEY GENERAL'S STATEMENT OF LEGAL AUTHORITY FOR MAINE'S PRETREATMENT PROGRAM

1. Authority to Apply Categorical Pretreatment Standards For Industrial Users.

State law provides authority to apply to industrial users of publicly owned treatment works ("POTW") pretreatment effluent standards and limitations promulgated under sections 307(b) and (c) of the CWA as amended, including the general prohibition against pass through and interference, prohibitive discharge standards under 40 CFR 403.5, and local limitations developed by the POTW.

FEDERAL AUTHORITY: CWA §§ 307 and 510; 40 CFR 403.5, 403.6, 403.8 and 403.10.

STATE STATUTORY AND REGULATORY AUTHORITY: 38 M.R.S.A. § 414-B; 06-096 CMR Chp. 528 §§ 6, 7 and 9.

REMARKS OF THE ATTORNEY GENERAL:

The Department is authorized to implement a State pretreatment program as part of the State NPDES program in accordance with federal law under the provisions of 38 M.R.S.A. § 414-B. The Department's rules 06-096 CMR Chp. 528 implement the requirements of 40 CFR 403. Section 414-B and Chapter 528 govern the State's pretreatment program, and their requirements are enforceable under 38 M.R.S.A. § 349. The procedures for permitting POTWs and imposing necessary requirements and conditions in permits are contained in 06-096 CMR Chps. 528 and 2 of the Department's rules.

2. Authority to Apply Pretreatment Requirements in Permits for Publicly-Owned Treatment Works.

State law provides authority to apply in terms and conditions of permits issued to POTWs the applicable requirements of section 402(b)(8) of the CWA and 40 CFR 403, including:

a. The elements of an approved POTW pretreatment program as required by 40 CFR 403.8(c). 06-096 CMR Chp. 528 § 9 (c);

b. A modification clause requiring that the publicly owned treatment works' permit be modified or alternatively revoked and reissued after the effective date for approval of the state pretreatment program to incorporate into the POTW's permit an approved POTW pretreatment program or a compliance schedule for developing a POTW pretreatment program where the addition of pollutants into a POTW by an Industrial User or combination of Industrial Users presents a substantial hazard to the functioning of the treatment works, quality of the receiving waters, human health, or the environment. 06-096 CMR Chp. 528 § 9 (e);

c. Prohibitive discharge limitations applicable to industrial users as required by 40 CFR 403.5. 06-096 CMR Chp. 528 § 6; and

d. Demonstrated percentages of removal for those pollutants for which a removal allowance was requested in accordance with the requirements of 40 CFR 403.7. 06-096 CMR Chp. 528 §8.

FEDERAL AUTHORITY: CWA §§ 402(b)(1)(A), 402(b)(1)(C) and 510; 40 CFR 122.44(j), 122.62(a)(7 and 9), 403.5, 403.7, 403.8 (c and d) and 403.10.

STATE STATUTORY AND REGULATORY AUTHORITY: 38 M.R.S.A. § 414-A(5); 06-096 CMR Chps. 523 § 5 and 528 §§ 6, 8, and 9 (c and e).

REMARKS OF THE ATTORNEY GENERAL:

See remarks in Part II (1).

3. Authority to Require Information Regarding the Introduction of Pollutants into Publicly-Owned Treatment Works and Compliance with Section 204 (b).

State law provides authority to require:

a. Conditions in permits issued to publicly-owned treatment works requiring the permittee to:

(1) Give notice to the state permitting agency (the Department) of new introductions of pollutants into such works from any source which would be a new source as defined in section 306 of the CWA if the source were discharging pollutants directly to waters;

(2) Give the Department notice of new introductions of pollutants into such works from a source which would be a point source subject to section 301 if it were discharging such pollutants directly to waters;

(3) Give the Department notice of a substantial change in volume or character of pollutants introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit; and

(4) Identify in terms of character and volume of pollutants any significant source introducing pollutants subject to pretreatment standards under section 307(b) of the CWA as amended.

b. Compliance by industrial users with CWA requirements concerning user charges and construction costs.

FEDERAL AUTHORITY: CWA § 402(b)(8) and 204(b); 40 CFR 122.42(b), 403.8 and 403.10.

STATE STATUTORY AND REGULATORY AUTHORITY: 38 M.R.S.A. §414(3); 06-096 CMR Chps. 523 § 3 and 528 § 9.

REMARKS OF THE ATTORNEY GENERAL:

See remarks in Part II (1).

4. Authority to Make Determinations on Requests for Pretreatment Program Approval and Removal Allowances.

State law provides authority to review, approve, or deny:

a. Requests for POTW pretreatment program approval in accordance with the requirements of 40 CFR 403.8(f) and 403. 11. 06-096 CMR Chp. 528 §§ 9 (f) and 11; and

b. Requests for authority to reflect removal achieved by the publicly owned treatment works in accordance with the requirements of 40 CFR 403.7, 403.10(f)(1), and 403. 11. 06-096 CMR Chp. 528 §§ 8 and 11.

FEDERAL AUTHORITY: CWA §§ 307(b) and 402(b)(8); 40 CFR 403.7, 403.8, 403.10 and 403.11.

STATE STATUTORY AND REGULATORY AUTHORITY: 38 M.R.S.A. § 414-B; and 06-096 CMR Chp. 528 §§ 8, 9 (f) and 11.

REMARKS OF THE ATTORNEY GENERAL:

See remarks in Part II (1).

5. Authority to Make Initial Determinations on Categorization of Industrial Users and Requests for Fundamentally Different Factors Variances.

State law provides authority to:

a. Make a determination of whether or not an industrial user falls in a particular industrial subcategory in accordance with the requirements of 40 CFR 403.6. 06-096 CMR Chp. 528 § 7; and

b. Deny or recommend approval of requests for Fundamentally Different Factors variances for industrial users as required by 40 CFR 403.10(f)(1) and 403.13. 38 M.R.S.A. § 414-B; 06-096 CMR Chp. 528 § 13.

FEDERAL AUTHORITY: CWA §§ 402(b)(1)(A), 402(b)(8) and 510; 40 CFR 403.6, 403.10 and 403.13.

STATE STATUTORY AND REGULATORY AUTHORITY: 38 M.R.S.A. § 414-B; and 06-096 CMR Chp. 528 §§ 7 and 13.

REMARKS OF THE ATTORNEY GENERAL:

See remarks in Part II (1).

6. Authority to Apply Recording, Reporting and Monitoring Requirements.

State law provides authority to:

a. Require any industrial user of a publicly owned treatment works to:

(1) Submit the report required by 40 CFR 403.12(b), which

(a) Sets forth basic information about the industrial user (e.g. process, flow),

(b) Identifies the characteristics and amount of the waste discharged by the

industrial user to the POTW, and

(c) Proposes a schedule by which any technology or operation and maintenance practices required to meet pretreatment standards will be installed; 06-096 CMR Chp. 528 § 12(b).

(2) Submit the reports required by 40 CFR 403.12(c), which account for the industrial user's progress in installing any required pretreatment or operation and maintenance practices. 06-096 CMR Chp. 528 § 12 (c);

(3) Submit the report required by 40 CFR 403.12(d), following the final compliance date for the applicable pretreatment standard. 06-096 CMR Chp. 528 § 12 (d);

(4) Submit periodic reports on continued compliance with applicable pretreatment standards as required by 40 CFR 403.12(e). 06-096 CMR Chp. 528 § 12 (e); and

(5) Submit any other reports required under the NPDES or pretreatment regulations or under state law. 38 M.R.S.A. §§ 414 (3) and 414-A (3).

b. Require POTWs subject to the requirement of 40 CFR 403.8(a) to:

(1) Report on progress in developing an approvable POTW pretreatment program as required by 40 CFR 403.12(h). 06-096 CMR Chp. 528 § 12 (h); and

(2) Submit any other reports required under the NPDES or pretreatment regulations or under state law. 38 M.R.S.A. §§ 414 (3) and 414-A (3).

c. Require POTWs subject to the requirements of 40 CFR 403.8(a), and all industrial users subject to pretreatment standards to:

(1) Establish and maintain records as required by 40 CFR 403.12(n);

(2) Install, calibrate, use, and maintain monitoring equipment or methods (including biological monitoring methods, when appropriate) necessary to determine continued compliance with pretreatment standards and requirements;

(3) Take samples of effluents (in accordance with specified methods at such locations, at such intervals, and in such manner as may be prescribed); and

(4) Provide other information as may reasonably be required.

38 M.R.S.A. §§ 414 (3) and 414-A (3); 06-096 CMR Chp. 528 § 9 (f).

FEDERAL AUTHORITY: CWA §§ 308(a and b), and 402(b)(2 and 9); 40 CFR 122.41(i and j), 122.48, 123.26(c), 403.7, 403.8, 403.10 and 403.12.

STATE STATUTORY AND REGULATORY AUTHORITY: 38 M.R.S.A. §§ 414 (3) and 414-A (3); 06-096 CMR Chps. 523 §§ 3 and 8, and 528 §§ 8, 9 and 12.

REMARKS OF THE ATTORNEY GENERAL:

See remarks in Part II (1), and see remarks in Part I (5).

7. Authority to Apply Entry, Inspection and Sampling Requirements.

State law provides authority to enable authorized representatives of the state or of POTWs with approved pretreatment programs, upon presentation of such credentials as are necessary to:

a. Have a right of entry to, upon, or through any premises of a POTW or of an industrial user of a POTW in which premises an effluent source is located or in which any records are maintained;

b. At reasonable times have access to and copy any records required to be maintained;

c. Inspect any monitoring equipment or method which is required; and

d. Have access to and sample any discharge of pollutants to state waters or to a POTW resulting from the activities or operation of the POTW or industrial user.

FEDERAL AUTHORITY: CWA §§ 308(a and b), and 402(b)(2 and 9); 40 CFR 122.41(i), 123.26(c), 403.7, 403.8, 403.10 and 403.12.

STATE STATUTORY AND REGULATORY AUTHORITY: 38 M.R.S.A. § 414 (3); 06-096 CMR Chps. 523 § 3, and 528 §§ 8, 9 and 12.

REMARKS OF THE ATTORNEY GENERAL:

See remarks in Part II (1), and see remarks to Part I (5).

8. Authority to Issue Notices, Transmit Data, and Provide Opportunity for Public Hearing and Public Access to Information.

State law provides authority to comply with the requirements of 40 CFR 403.11 to:

a. Notify the public, affected states, and appropriate governmental agencies of (1) Requests for POTW pretreatment program approval or for removal credit allowances, and (2) Approval of POTW pretreatment programs or POTW removal credit authority;

b. Transmit such documents and data to and from the EPA and to other appropriate governmental agencies as may be necessary;

c. Provide an opportunity for public hearing, with adequate notice, before ruling on applications for POTW pretreatment program approval or removal credits; and

d. Ensure that requests for POTW pretreatment program approval and all comments received on these requests for program approval are available to the public for inspection and copying.

State law provides authority to make information available to the public, consistent with the requirements of the CWA and General Pretreatment Protections, including any information obtained pursuant to any monitoring, reporting, or sampling requirements or as a result of sampling or other state investigations. The Department may hold confidential any information (except effluent data) shown by any person to be entitled to protection as trade secrets of that person.

FEDERAL AUTHORITY: CWA §§ 101 and 308(a and b); 40 CFR 403.11 and 403.14.

STATE STATUTORY AND REGULATORY AUTHORITY: 1 M.R.S.A. § 402 and 408; 06-096 CMR Chp. 528 §§11 and 14.

REMARKS OF THE ATTORNEY GENERAL:

See remarks in Part II (1), and see remarks in Part I (6).

9. Authority to Enforce Against Violations of Pretreatment Standards and Requirements.

State law provides authority to:

a. Enforce against violations by industrial users and POTWs of:

(1) Permit requirements;

(2) National categorical pretreatment standards, including the general prohibition against pass through and interference;

(3) Prohibitive discharge limitations developed in accordance with 40 CFR 403.5;

(4) Local limits developed by the POTW; and

(5) Requirements for recording, reporting, monitoring, entry, inspections, and sampling.

b. Enforce against violations described in paragraph (a) above, using enforcement mechanisms which include the following:

(1) Administrative orders, such as Notices of Violations, Final Orders and Consent Orders;

(2) Injunctive relief; and

(3) Civil and criminal penalties and fines which are comparable to the maximum penalties and amounts recoverable under section 309 of the CWA or are an actual and substantial economic deterrent to the actions for which they are assessed or levied.

FEDERAL AUTHORITY: CWA §§ 309, 402(b)(7) and 402(h); 40 CFR 403.8 and 403.10.

STATE STATUTORY AND REGULATORY AUTHORITY: 38 M.R.S.A. §§ 347-A, 348, 349, 414 (3 and 5) and 414-B; 06-096 CMR Chp. 528 § 9.

REMARKS OF THE ATTORNEY GENERAL:

See remarks in Part (II) (1), and see remarks in Part (I) (9).

10. Authority to Control Industrial Users.

State law provides authority for the state to act as control authority and carry out the activities set forth in 40 CFR 403.8, as required under 40 CFR 403. 10.

FEDERAL AUTHORITY: CWA § 402(b)(9); 40 CFR 403.8 and 403.10.

STATE STATUTORY AND REGULATORY AUTHORITY: 38 M.R.S.A. §§ 413 and 414-B; 06-096 CMR Chp. 528 §§ 6, 7, 9 and 12 (e and h).

REMARKS OF THE ATTORNEY GENERAL:

Section 413 (1) of Title 38 prohibits the direct or indirect discharge of pollutants without a license, and § 414-B authorizes the State to enforce a local pretreatment regulation, user agreement, permit or similar agreement between an industrial user and the owner of a POTW. Where a POTW has not granted a license pursuant to 40 CFR 403, an individual industrial user may not indirectly discharge to waters of the State by discharging pollutants through a POTW. This prohibition is not dependent on whether there is interference with the treatment works, and is in addition to the general and specific discharge prohibitions contained in 06-096 CMR Chp. 528 §§ 6 and 7. Absent an approved local program, and pursuant to Chp. 528 § 12 (e and h), the Department becomes the Control Authority for the purposes of periodic compliance and monitoring reports from industrial users subject to categorical pretreatment standards and from significant non-categorical industrial users.

11. Adoption of Federal Standards: Incorporation by Reference.

State law provides authority to adopt federal regulations through expedited rulemaking under 5 M.R.S.A. §§ 8051-A and 8053. The Department can, therefore, adopt and implement federal regulations that may require changes in the State pretreatment program. 5 M.R.S.A. § 8056 (1) (B). However, State law does not permit the prospective incorporation of future federal law. Attorney General Report 1949-50, p. 230 (to enact legislation adopting standards which

may change by the action of some agency not within the control and direction of the Legislative is invalid).

STATE STATUTORY AND REGULATORY AUTHORITY: 5 M.R.S.A. §§ 8051-A, 8053 and 8056 (1)(B), and 38 M.R.S.A. § 341-D (1-B).

12. Treatment of Maine Indian Tribes as "States" Under the CWA.

REMARKS OF THE ATTORNEY GENERAL: For the reasons set forth in Part I (14) (a), Indian Tribes in Maine cannot be deemed "States" under the CWA.

CERTIFICATION OF LEGAL AUTHORITY

I HEREBY CERTIFY, pursuant to Section 402(b) of the Federal Water Pollution Control Act, as amended (33 U.S.C. § 1251, et seq.), that the laws of the State of Maine provide adequate authority to carry out the programs set forth in the "Program Description" submitted by the Maine Department of Environmental Protection. The specific authorities provided are contained in lawfully enacted or promulgated statutes, or in regulations which are in full force and effect or become effective upon approval by EPA of the State's NPDES and/or Pretreatment Programs.

Dated at Augusta, Kennebec County, Maine this day of October, 1999.

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ANDREW KETTERER
Attorney General of the State of Maine
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Augusta, Maine 04333-0006